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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. ~~276~~ 40

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

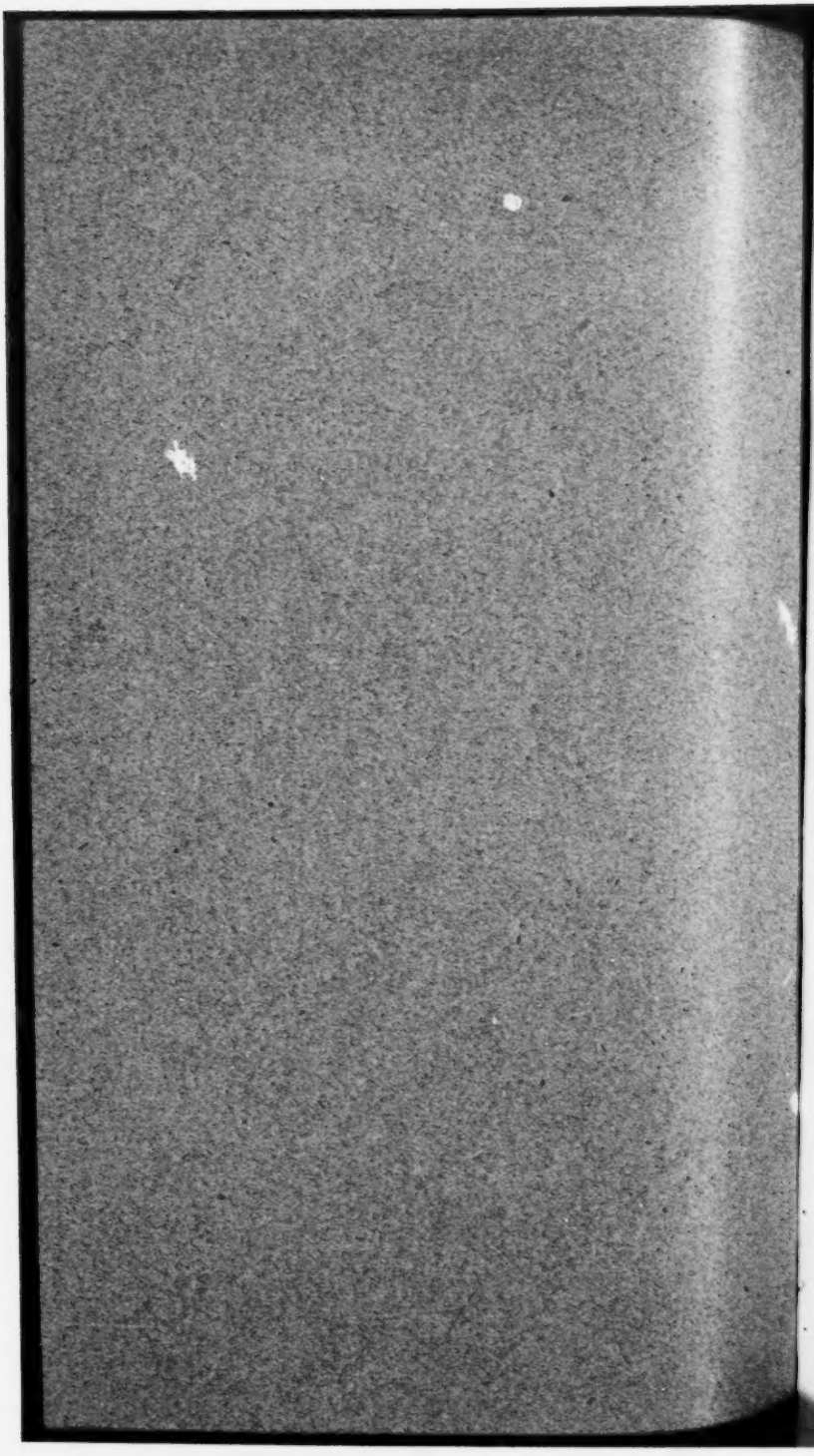
vs.

LUCY DIXON, ADMINISTRATRIX OF ALEXANDER DIXON, DECEASED; R. H. CHALKEY, AND WILLIAM SIDLES.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED APRIL 26, 1899.

(17,382.)



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INDEX.

	Original.	Print
Caption	*a*	1
Transcript from Boyd circuit court	1	1
Caption	1	1
Petition	1	1
Exhibit A—Order appointing administratrix	3	2
Summons	3	2
Return on summons	4	3
Order filing petition for removal	4	3
Petition for removal	4	4
Bond for removal	7	5
Order approving bond	9	6
Order overruling motion for removal	9	6
Order allowing defendant time to answer	9	6
Order tendering amended petition	10	7
Order noting filing of defendant's answer	10	7
Order withdrawing amended petition	10	7
Order noting plaintiff's reply to C. & O. R'y Co.	10	7
Order noting plaintiff's reply to Chalkey and Sidles	10	7

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 8, 1899.

	Original	Print
Jury called	10	7
Answer of C. & O. R'y Co.	11	7
Answer of Chalkey and Sidles	12	8
Reply to answer of C. & O. R'y Co.	13	8
Reply to answer of Chalkey and Sidles	13	9
Order continuing trial	14	9
Order offering to file amended petition, &c.	15	10
Order refusing to file amended petition	15	10
Verdict	16	11
Judgment	17	11
Order filing grounds and motion for new trial	17	11
Motion and grounds for new trial	17	11
Order overruling motion and grounds for new trial	21	13
Order giving time to file bill of exceptions	21	13
Order tendering bill of exceptions	21	13
Order filing bill of exceptions	22	13
Clerk's certificate	22	14
Statement for appeal	23	14
Supersedeas bond	24	15
Power of attorney	25	15
Order entering appearance of appellee	26	16
Order filing grounds and motion to submit	26	16
Grounds of motion to submit	26	16
Order of submission	28	17
Judgment	28	17
Opinion	28	17
Order on motion to extend time for filing petition for rehearing	33	20
Affidavit of A. M. J. Cochran	34	20
Objections to delay	35	21
Order granting time for filing petition for rehearing	36	21
Order filing petition for rehearing	36	21
Petition for rehearing	37	22
Order filing response	48	27
Response to petition for rehearing	48	27
Order overruling petition for rehearing	52	29
Order noting dissenting opinion	52	30
Dissenting opinion	53	30
Notice of severance	53	30
Writ of error	55	31
Bond	58	32
Assignment of errors	59	33
Præcipe for transcript	61	34
Certificate to transcript	62	34
Citation and service	63	35
Citation and service	64	35

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 28th day of October, A. D. 1898.

Present: Chief Justice Lewis, Judges James H. Hazelrigg, Thos. H. Paynter, A. R. Burnam, B. L. D. Guffy, George Du Relle, and Jas. D. White.

CHESAPEAKE & OHIO RAILWAY CO., R. H. CHALKEY, and WILLIAM SIDLES, Appellants,
vs.
LUCY DIXON, Administratrix of Alexander Dixon, Dec'd, Appellee.

Be it remembered that heretofore, to wit, on September 1st, A. D. 1896, the appellants, by counsel, filed in the office of the clerk of the Kentucky court of appeals a transcript of a record in words and figures following, to wit:

1 STATE OF KENTUCKY, *County of Boyd*, } *sct:*

Boyd Circuit Court.

Pleas before the Honorable S. G. Kinner, judge of the Boyd circuit court, at the court-house thereof, in the city of Catlettsburg, Kentucky, on the 12th day of October, 1895, to wit:

LUCY DIXON, Adm'r'x of Alexander Dixon, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, R. H. CHALKEY, and Wm. Sidles, Defendants.

Be it remembered that on the 19th day of October, 1894, the above-named plaintiff produced and filed in the clerk's office of the Boyd circuit court *his* certain petition against the above-named defendants, which is clothed in words and figures as follows, to wit:

Petition.

Boyd Circuit Court.

LUCY DIXON, Adm'r'x of Alexander Dixon, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, R. H. CHALKEY, and Wm. Sidles, Defendants.

The plaintiff, Lucy Dixon, says that Alexander Dixon departed this life intestate on 22nd day of September, 1894, while a resident

of and domiciled in Boyd county, Kentucky; that by an
2 order of the Boyd county court made and entered on the — day of Sept., 1894, plaintiff was appointed administratrix of his estate, and gave bond and duly qualified and is now acting as the administratrix of the said estate. A copy of said order is filed herewith as part hereof, marked "A."

She says that the defendant The Chesapeake & Ohio Railway Company is and at the time hereinafter stated was a corporation and common carrier of freight and passengers for hire, and said defendant, — locomotives, cars, and other appurtenances, now operates and at the times hereinafter stated operated lines of railway extending into the county of Boyd and State of Kentucky. She says that on the 22nd day of September, 1894, while crossing the track of the defendant at the crossing of the Ashland and Catlettsburg Turnpike road and within the corporate limits of said town, the said intestate, Alexander Dixon, was by the negligence of the defendant The Chesapeake & Ohio Railway Company and of its agents and servants, R. H. Chalkey and Wm. Sidles, who were in charge thereof, run over and instantly killed by one of defendant's passenger trains while on its way from Catlettsburg to Ashland, Boyd county, Kentucky, whereby she has been damaged in the sum of thirty thousand dollars.

At the time and place when and where plaintiff'- intestate was injured, as aforesaid, the defendants R. H. Chalkey and Wm. Sidles were and — a long time theretofore had been servants of the corporate defendants, in charge and control of said train, and then and there were and — long time -heretofore had continuously been respectively engineer and fireman of said train, and said negligence of the corporate defendant was done by and through its said
3 servants and other of its servants then and there in its employment, and said negligence was the joint negligence of all the defendants.

Wherefore plaintiff prays for a judgment against the defendants — $30,000, for her costs, and all proper relief.

SCOTT & DINKLE,
JOHN F. HAGER,
Att'ys for Pl'ff.

The exhibit marked "A," referred to in the foregoing petition, is clothed in words and figures as follows, to wit:

Boyd Circuit Court, September Special Term, 29th Day of Sept., 1894.

On motion of Lucy R. Dixon, widow of Alexander Dixon, deceased, she is hereby appointed administratrix of the estate of said Alexander Dixon, deceased; thereupon said Lucy R. Dixon, being in court, accepted the appointment and took the oath required by law and, together with A. C. Howell and H. S. Dixon, her sureties, entered into and acknowledged bond, conditioned as required by law; which bond is approved and accepted by the court; there-

upon the court grants letters of administration herein to her in due form of law.

A copy.
Attest: JOHN VOSE, *C. B. C. C.*

And upon the foregoing petition the following summons issued, to wit:

The Commonwealth of Kentucky to the sheriff of Boyd county:

You are hereby commanded to summon the Chesapeake & Ohio Railway Company, R. H. Chalkey, and Wm. Sidles to answer, on the first day of the next January term of the Boyd circuit court, a petition in ordinary filed against them in said court by Lucy Dixon, adm'r'x of Alexander Dixon, and warn them that upon failure to answer *or* they will be proceeded against for contempt; and you will make due return for this summons to the next January term of said court.

Given under my hand, as clerk of said court, this 19th day of October, 1894.

BEN. U. STEELE,
Clerk B. C. C.

4 Upon the back of said summons the following return appears, to wit:

Executed by delivering a copy of the within summons to R. H. Chalkey and a copy of the same to H. C. Hite, the nearest agent of the Chesapeake & Ohio railway to the court-house, on Nov. 13th, and a copy of the same to William Sidles on Nov. 16th, 1894.

JOHN O'KELLY, *S. B. C.*

And afterwards, to wit:

Ordinary.

Boyd Circuit Court, January Term, January 30th, 1895.

LUCY DIXON, Adm'r'x, Plaintiff,
against
C. & O. RAILWAY CO., Defendant.

The defendant produced and filed its petition herein and tendered therewith a bond, as required by law in such cases made and provided, and thereupon moved the court to transfer and remove this cause to the United States court for the district of Kentucky; which motion the court takes under advisement.

The petition and bond referred to in the foregoing order *is* clothed in words and figures as follows, to wit:

Petition for Removal of this Cause to the United States Circuit Court for the District of Kentucky.

Boyd Circuit Court.

LUCY DIXON, Administratrix of Alexander Dixon, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY CO. ET AL., Defendants.

5 To the honorable the circuit court of Boyd county, State of Ky.:

Your petitioner, Chesapeake & Ohio R'y Co., respectfully shows that it is one of the defendants in the above entitled suit, and that the matter and amount in dispute in the said suit, exclusive of interest and cost, exceeds the sum or value of $2,000.00.

Your petitioner further shows that the said suit is of a civil nature, and that there is in said suit a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit, a controversy between your said petitioner, The Chesapeake & Ohio Railway Company, who avers that it was at the time of the bringing of this suit and still is a corporation created, organized, and existing under and by virtue of the laws of the State of Virginia and a citizen of the said State of Virginia, and the said plaintiff, Lucy Dixon, administratrix of Alexander Dixon, who, *was* your petitioner avers, was then and still is a citizen of the State of Kentucky; that the said controversy is of the following nature, viz:

Whether your petitioner is liable to the said plaintiff for damages on account of the death of the said intestate, alleged to have been caused by the negligence of certain of its servants therein named and made defendants thereto and other of its servants then and there in its employment and who are not named, it being claimed by said plaintiff that because thereof your petitioner is liable in damages to her, and that your petitioner and the said plaintiff are both actually interested in said controversy.

6 Your petitioner further states that the defendants R. H. Chalkey and William Sidles are neither necessary nor proper parties defendant to this cause, and that they were made parties defendant to this cause for the sole and single purpose to prevent a removal by petitioner of this cause to the circuit court of the United States for the district of Kentucky and thereby unlawfully to deprive your petitioner of the right conferred upon it by the Constitution and laws of the United States.

And your petitioner offers herewith a bond, with good and sufficient surety, for its entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto, and it prays this honorable court to proceed no further herein except to make the order of removal required by law

and to accept said surety and bond, to cause the record herein to be removed into said circuit court of the United States for the district of Kentucky; and he will ever pray.

WADSWORTH & COCHRAN,
Att'ys for Petitioner.

STATE OF KENTUCKY, }
County of Boyd, } *sct:*

I, W. H. Wadsworth, being duly sworn, do say that I am a member of the firm of Wadsworth & Cochran, the attorneys for the petitioner in the above-entitled cause; that I have read the fore-
7 going petition and know the contents thereof; that the statements and allegations therein contained are true as I verily believe.

W. H. WADSWORTH.

Subscribed by the said W. H. Wadsworth in my presence and by him sworn to before me this 30th day of January, A. D. 1895.

M. F. HAMPTON,
D. C., Boyd Circuit Court.

LUCY DIXON, Administratrix of Alexander Dixon, Plaintiff, }
vs. } Bond.
CHESAPEAKE & OHIO RAILWAY COMPANY ET AL., Defendants. }

Know all men by these presents that we, The Chesapeake & Ohio Railway Company, as principal, and W. H. Wadsworth and A. M. J. Cochran, as sureties, are hereby held and firmly bound unto Lucy Dixon, administratrix of Alexander Dixon, in the penal sum of one thousand dollars; for the payment thereof, well and truly to be made unto the said Lucy Dixon, administratrix of Alexander Dixon, her heirs and assigns, we bind ourselves, jointly and severally, firmly by these presents;

Yet upon these conditions: The said Chesapeake & Ohio Railway Company having petitioned the circuit court of Boyd county, State of Kentucky, for the removal of a certain cause therein pending, wherein Lucy Dixon, administratrix of Alexander Dixon, is plaintiff and The Chesapeake & Ohio Railway Company is defendant, — the circuit court of the United States in and for the district of Kentucky:

8 Now, if the said Chesapeake & Ohio Railway Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all cost that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 29th day of January, A. D. 1895.

THE CHESAPEAKE & OHIO RAILWAY CO.,
By A. M. J. COCHRAN. [SEAL.]
W. H. WADSWORTH. [SEAL.]
A. M. J. COCHRAN. [SEAL.]

STATE OF KENTUCKY, *Mason County,* } *sct:*

We, W. H. Wadsworth and A. M. J. Cochran, both of Mason county, in said State, the sureties in the foregoing bond, being duly sworn, do depose and say, each for himself, that we are residents of the State of Kentucky and property-holders therein, and that we are each of us worth the sum of one thousand dollars, over and above all our debts and liabilities and exclusive of property by law exempt from execution, and that each have property in the State of Kentucky liable to execution and of the value of more than one thousand dollars.

W. H. WADSWORTH.
A. M. J. COCHRAN.

9 Subscribed in my presence by W. H. Wadsworth and A. M. J. Cochran and by them sworn to before me this 29th day of Jan., A. D. 1895.

WM. D. COCHRAN,
Clerk Mason County Court.

And at another day, to wit:

Boyd Circuit Court.

LUCY DIXON, Administratrix, Plaintiff, *against* C. & O. RAILWAY CO., Defendant. } Ordinary.

This cause coming up on the motion of the defendant for a removal of this cause to the U. S. court for the district of Kentucky, upon its petition and bond already presented, and the court, being sufficiently advised, adjudges that the bond filed be approved; but the court, having fully considered the same, overruled the petition and motion of the defendant for a removal of this cause to the U. S. court for the district of Kentucky; and to this ruling and opinion of the court the defendant excepts.

It is ordered that this cause be continued generally. On motion of the defendant, 30 days is allowed it in which to file its answer to the petition herein.

And at another day, to wit:

Boyd Circuit Court, September Term, September 28th, 1895.

LUCY DIXON, Adm'r'x. Plaintiff,
against
C. & O. RAILWAY Co., Defendant. } Ordinary.

10 The plaintiff tendered and offered to file an amended petition herein; to the filing of which the defendant, by counsel, objects, and this cause is submitted to the court upon motion to file said amended petition of the plaintiff, together with the objection thereto.

And at another day, to wit:

Boyd Circuit Court, September Term, October 8th, 1895.

LUCY DIXON, Adm'x, Plaintiff,
against
C. & O. RAILWAY Co., &c., Defendants. } Ordinary.

On motion of the defendants, their answer filed in vacation is now noted of record as filed.

On motion of the plaintiff, her amended petition, tendered on a former day of the present term, is now withdrawn.

The plaintiff filed reply to the answer of defendant C. & O. Railway Co.

The plaintiff filed reply to the answer of the defendants R. H. Chalkey, &c., herein.

The parties appeared by their attorneys, and thereupon came a jury, to wit, John Lambert, J. H. Crow, Frank Brown, J. J. Emerick, A. Wolfe, Ben. Sweet, Jas. L. Harris, Jas. W. Butler, J. S. Mitchell, W. R. Holmes, T. L. Ford, and J. D. Mayhew, who were duly sworn to try the issue joined, and, having heard the evidence in part, it was announced by the court that there was not sufficient time to progress further with the trial hereof this day. The jury are therefore allowed to separate and, with the admonition prescribed
11 by law, they are adjourned until 8½ o'clock tomorrow morning.

The answers filed March 20th, 1895, referred to in the foregoing order, are clothed in words and figures as follows, to wit:

Answer of C. & O. Railway Co.

Boyd Circuit Court.

LUCY DIXON, Adm'x, &c., Plaintiff,
vs.
THE C. & O. RAILWAY Co., Defendant. } Answer.

The defendant, The C. & O. Railway Company, comes and for answer to the plaintiff's petition denies that plaintiff's intestate was run over and killed by one of its passenger trains by the negli-

gence of the defendant or its codefendants or either of them. It denies that it was guilty of negligence on the occasion alleged, or that its negligence was done by or through any of its servants, or that any such negligence was the joint negligence of all defendants.

Par. 2. For further defense it states that at the time and place alleged the plaintiff's intestate was negligently and carelessly attempting to cross defendant C. & O.'s railroad track, that said negligence contributed to the injury complained of, and that if it had not been for the said negligence of plaintiff's intestate the said injury would not have been received.

F. T. D. WALLACE,
WADSWORTH & COCHRAN,
Att'ys for Defendant.

12 *Answer of Chalkey & Sidles.*

Boyd Circuit Court.

LUCY DIXON, Adm'x, &c., Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY CO., &c., Defendant.
} Answer of Chalkey & Sidles.

The defendants R. H. Chalkey and Wm. Sidles come and for answer to the plaintiff's petition deny that plaintiff's intestate was run over and killed by one of their codefendant's passenger trains by the negligence of their defendant or their codefendant or either of them. They deny that they or either of them were guilty of negligence on the occasion alleged, or that the negligence was done by or through any of their codefendants' servants, or that any such negligence was the joint negligence of all defendants.

Par. 2. For further defense, they state that at the time and place alleged the plaintiff's intestate negligently and carelessly attempted to cross defendant's C. & O. railroad track; that said negligence contributed to the injury complained of, in that if it had not been for the said negligence of plaintiff's intestate the said injury would not have been received.

Wherefore they pray to be hence dismissed and for costs, &c.

F. T. D. WALLACE,
WADSWORTH & COCHRAN,
For Defendants.

13 The reply to answer of the C. & O. R'y Co., referred to in the foregoing order, is clothed in words and figures as follows, to wit:

Boyd Circuit Court.

LUCY DIXON, Adm'r'x, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, &C., Defendants.
} Reply.

For reply to answer of defendant C. & O. R'y Co., plaintiff denies that at the time and place alleged in the petition the plaintiff's in-

testate negligently or carelessly attempted to cross defendant C. & O. R'y Company's track, or that by said or any negligence or that in attempting to cross said track at the time and place in question plaintiff's intestate contributed to the injury complained of, or that by any negligence of the plaintiff's intestate he received the injury complained of in the petition, or that but for any or said negligence of plaintiff's intestate said injury would not have been received.

Wherefore she prays as in her petition and for all proper relief.

SCOTT & DINKLE AND
JOHN F. HAGER, *P. Q.*

The reply to answer of Chalkey & Sidles, referred to in the foregoing order, is clothed in words and figures as follows, to wit:

Boyd Circuit Court.

LUCY DIXON, Adm'r'x, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, &C., Defendants.

14 For reply to answer of defendants R. H. Chalkey and Wm. Sidles, plaintiff denies that at the time and place alleged in the petition the plaintiff's intestate negligently or carelessly attempted to cross defendant C. & O. R'y Company's track, or that by — said railroad track at the time and place in question plaintiff's intestate contributed to the injury complained of, or that by any negligence of the plaintiff's intestate he received the injury complained of in the petition, or that but for any negligence of plaintiff's intestate said injury would not have been received.

Wherefore she prays as in her petition and for all proper relief.

SCOTT AND DINKLE AND
JOHN F. HAGER, *P. Q.*

And at another day, to wit:

Boyd Circuit Court, September Term, October 9th, 1895.

LUCY DIXON, Adm'r'x, Plaintiff,
vs.
C. & O. RAILWAY CO., Defendant. } Ordinary.

The jury empaneled and sworn in this cause on yesterday met pursuant to adjournment, and the trial of this cause is now resumed. At the conclusion of the testimony offered by both parties, by consent it is ordered that the jury be conducted in a body by Wm. Kline, sheriff of Boyd county, to the place where the injury or death occurred which is the subject of litigation in this action, which by consent shall be shown to them by J. J. Emerick, one of the jurors in this action, the jury being admonished while
15 thus absent that no person other than the said Emerick should speak to them upon any subject connected with this trial.

The jury, having had a view of the place aforesaid, reconvened in court, and it being announced by the court that there was not sufficient time to complete this trial this day, the jury are allowed to separate, and, with the admonition prescribed by law, they are adjourned until 9 o'clock tomorrow morning.

And at another day, to wit:

Boyd Circuit Court, September Term, October 10th, 1895.

Lucy Dixon, Adm'r'x, Plaintiff,
vs.
C. & O. Railway Co., &c., Defendants. } Ordinary.

The jury empaneled and sworn in this cause met pursuant to adjournment, and the trial *of* hereof is now resumed.

The plaintiff tendered and offered to file an amended petition herein; to the filing of which the defendants objected; which objection being heard *are* sustained, the court refusing to allow said amended petition to be filed; to which plaintiff excepts.

The jury having heard all the evidence, the instructions of the court, and arguments of counsel, it was announced by the court that there was not sufficient time—this day—to complete the trial; the jury are therefore allowed to separate, and, with the admonition prescribed by law, are adjourned until 9 o'clock tomorrow morning.

16 And at another day, to wit:

Boyd Circuit Court, September Term, October 11th, 1895.

Lucy Dixon, Adm'r'x, Plaintiff,
vs.
C. & O. Railway Company, Defendant. } Ordinary.

The jury empaneled and sworn in this cause met pursuant to adjournment, and, having heard all the evidence, instructions of the court, and arguments of counsel in this cause, retired to their room to consider of a verdict; but not returning one, though confined to their room the whole of the day, they returned into court and are allowed to separate, and, with the admonition prescribed by law, are adjourned until 8½ o'clock tomorrow morning.

And at another day, to wit:

Boyd Circuit Court, September Term, October 12th, 1895.

Lucy Dixon, Adm'r'x, Plaintiff,
vs.
C. & O. Railway Company, &c., Defendants. } Judgment.

This day came the parties, by their attorneys, and the jury empaneled and sworn in this cause met pursuant to adjournment and retired to their room, and awhile returned the following verdict, to wit:

"We, the jury, agree and find for the plaintiff, and assess the damages at ten thousand dollars ($10,000).

J. J. EMERICK,
BEN. SWEET,
J. D. MAYHEW,
17 FRANK BROWN,
T. L. FORD,
JOHN LAMBERT,
J. H. CROW,
JAS. L. HARRIS, AND
JAS. W. BUTLER."

Wherefore it is adjudged by the court that the plaintiff, Lucy Dixon, administratrix of the estate of Alexander Dixon, deceased, recover against the defendants, The Chesapeake and Ohio Railway Company and R. H. Chalkey and Wm. Sidles, the sum of ten thousand dollars ($10,000) in damages, with interest thereon from this the 12th day of October, 1895, until paid, and her costs herein expended.

Ordered that the fees of the clerk be endorsed to his use. The defendants filed grounds, and thereupon moved the court for a new trial herein, and this cause is submitted upon said motion.

The motion and grounds for a new trial referred to in the foregoing order are clothed in words and figures as follows, to wit:

Boyd Circuit Court.

LUCY DIXON, Adm'r'x, &c., Plaintiff, *vs.* THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.	Motion & Grounds for New Trial.

Now comes defendants, jointly and severally, and move the court to set aside the verdict and judgment herein and to grant a new trial herein for the following reasons, to wit:

1. The court erred to the prejudice of defendants and of each of them in refusing to admit competent evidence offered by defendants.

18 2. The court erred to the prejudice of defendants and each of them in admitting incompetent evidence offered by the plaintiff and objected to by defendant.

3. The court erred to the prejudice of defendants and each of them in overruling defendants' motion to instruct the jury to find for defendants as in case of nonsuit, made at the close of the plaintiff's evidence.

4. The court erred to the prejudice of defendants and each of them in giving to the jury instructions No. 1, in typewriting, offered by plaintiff.

5. The court erred to the prejudice of defendants and each of them in giving to the jury instruction No. 2, in typewriting, offered it by plaintiff.

6. The court erred to the prejudice of defendants and each of them in giving to the jury instruction No. 3, in typewriting, offered by plaintiff.

7. The court erred to the prejudice of defendant- and each of them in giving to the jury instruction No. 4, in typewriting, offered by plaintiff.

8. The court erred to the prejudice of defendant- and each of them in giving to the jury instruction No. 5, in typewriting, on its own motion.

9. The court erred to the prejudice of the defendant- and each of them in giving to the jury instruction No. 6, in typewriting, on its own motion.

10. The court erred to the prejudice of defendants and each of them in giving to the jury instruction No. 7, in typewriting, on its own motion.

19 11. The court erred to the prejudice of defendants and each of them in giving to the jury instruction No. 8, in typewriting, offered by plaintiff.

12. The court erred to the prejudice of defendants and each of them in giving to the jury instruction No. 9, in typewriting, offered by plaintiff.

13. The court erred to the prejudice of defendants and each of them in giving to the jury instruction No. 11, in handwriting of John F. Hager, Esq.

14. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "A," in handwriting of W. H. Wadsworth, Esq., asked for by defendants.

15. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "B," in handwriting of A. M. J. Cochran, asked for by defendants.

16. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "C," in handwriting of W. H. Wadsworth, asked for by defendants.

17. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "D," in handwriting of W. H. Wadsworth, asked for by defendants.

18. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "E," in handwriting of W. H. Wadsworth, asked for by defendants.

20 19. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "F," in handwriting of W. H. Wadsworth, asked for by defendants.

20. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "H," in handwriting of A. M. J. Cochran, asked for by defendants.

21. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "I," in handwriting of W. H. Wadsworth, asked for by defendants.

22. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury — marked "J," in the handwriting of W. H. Wadsworth, asked for by defendants, being all of

said instructions in handwriting of said Wadsworth without modification made by the judge in his handwriting.

23. Because of excessive damages, appearing to have been given under influence of passion or prejudice.

24. Because of error in assessment of amount of recovery, it being too large.

25. The verdict is not sustained by sufficient evidence and is contrary to law.

26. Because of error of law occur-ing at the trial and excepted to by defendant.

F. T. D. WALLACE,
WADSWORTH & COCHRAN,
Att'ys for Defendants.

21 And at another day, to wit:

Boyd Circuit Court, September Term, October 14, 1895.

LUCY DIXON, Adm'r'x, Plaintiff,
vs.
C. & O. RAILWAY Co., &c., Defendants. } Ordinary.

The motion and grounds for a new trial filed herein by defendants, being now heard, are overruled; to which ruling of the court the defendants except.

On motion of defendants, time until the 10th day of the next regular term is given to prepare and file their bill of exceptions herein, and when filed to have same effect as though filed at this term.

And at another day, to wit:

Boyd Circuit Court, January Term, February 5th, 1896.

LUCY DIXON, Adm'r'x,
against
C. & O. RAILWAY Co. } (Ordinary.)

The defendant in each of the foregoing causes, six in number, tendered and offered to file bills of exception in each of said causes, which are passed to counsel for examination.

And at another day, to wit:

Boyd Circuit Court, January Term, February 12th, 1896.

22 LUCY DIXON, Adm'r'x. Plaintiff,
vs.
C. & O. RAILWAY COMPANY, Defendant. } Ordinary.

The examination of the bill of exceptions tendered by the defendants on a former day of the present term having been completed, the same is now signed and sealed by the circuit judge, filed, and ordered to be made a part of the record of this cause.

(The bill of exceptions is omitted.)

STATE OF KENTUCKY, *County of Boyd,* } *sct:*

I, G. H. Meade, clerk of the Boyd circuit court, in the State of Kentucky, do certify that the foregoing and annexed 203 pages and 5 lines contain a full, true, and complete transcript of the record and proceedings had in said court in the cause therein named, wherein Lucy Dixon, adm'r'x of the estate of Alexander Dixon, deceased, is plaintiff and Chesapeake & Ohio Railway Company, R. H. Chalkey, and William Sidles are defendants, with the omissions and exceptions stated by the clerk on page 204 of this record, and the same is as appears to me among the records and papers on file in this cause and proceedings therein.

Given under my hand this 26th day of May, 1896.

G. H. MEADE,
Clerk Boyd Circuit Court,
By W. C. McCLINTOCK, *D. C.*

23 Kentucky Court of Appeals.

CHESAPEAKE & OHIO RAILWAY COMPANY, R. H. CHALKEY, and William Sidles, Appellants,
vs.
LUCY DIXON, Administratrix of Alexander Dixon, Appellee.

Now come the appellants, The Chesapeake & Ohio Railway Company, R. H. Chalkey, and William Sidles, and jointly and severally appeal from judgment hereinafter referred to and make the following statements in accordance with section 739 of the civil code, to wit:

First. Names of the appellants are Chesapeake & Ohio Railway Company, R. H. Chalkey, and William Sidles.

Second. The name of the appellee is Lucy Dixon, administratrix of Alexander Dixon.

Third. The judgment appealed from was rendered on the 12th day of October, 1895, at the September term, 1895, of the Boyd circuit court, and may be found upon page 16 of the transcript.

Fourth. A summons is desired, directed to the sheriff of Boyd county, against the appellee.

WADSWORTH & COCHRAN,
Attorneys for Appellants.

24 Upon the 1st day of September, 1896, the appeal was granted by the clerk of this court pursuant to said statement and at request of appellant's attorney, and thereupon appellants executed the following supersedeas bond, viz:

Court of Appeals of Kentucky.

CHESAPEAKE & OHIO RAILWAY CO., Appellant,
vs.
LUCY DIXON, Adm'r'x of Alexander Dixon, Appellee.
} Supersedeas Bond.

Whereas said appellant has taken an appeal from a judgment of the Boyd circuit court, rendered at its September term, 1895, against *them* in favor of the appellee, for the sum of ten thousand dollars ($10,000), with interest thereon from 12th day of October, 1895, and costs, and the appellant desires to supersede said judgment:

Now, we, —— ——, principal, and W. H. Wadsworth and A. M. J. Cochran, securities, covenant to and agree with the appellee, Lucy Dixon, adm'r'x of Alexander Dixon, that the appellant will pay to the appellee all costs and demands that may be adjudged against the appellant on the appeal, and also that *they* will satisfy and perform the said judgment in case it shall be affirmed or any judgment or order which the court may render or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid, and also pay all rents, hire, or damage which, during the pendency of the appeal, may accrue on any of the property of which the appellee is kept out of possession by reason of the appeal.

Witness our hands this 1st day of Sept., 1896.

W. H. WADSWORTH,
By A. ADDAMS,
Attorney-in-fact.
A. M. J. COCHRAN,
By A. ADDAMS,
Attorney-in-fact.

Attest: A. ADDAMS, *C. C. A.*

Kentucky Court of Appeals.

CHESAPEAKE & OHIO RAILWAY CO. ET AL.,
Appellants,
vs.
LUCY DIXON, Adm'r'x of Alexander Dixon,
Appellee.
} Power of Attorney.

Know all men by these presents that we, W. H. Wadsworth and A. M. J. Cochran, do hereby authorize and empower A. Addams, clerk of the court of appeals, to subscribe our names as sureties of the Chesapeake & Ohio Railway Company to an appeal bond to be executed by said company upon an appeal about to be taken by it from a judgment of the Boyd circuit court rendered at its September term, 1895, in favor of Lucy Dixon, administratrix of Alexander Dixon, for the sum of $10,000, interest and cost.

Signed this first day of September, 1896.

W. H. WADSWORTH.
A. M. J. COCHRAN.

Subscribed and acknowledged before me by W. H. Wadsworth and A. M. J. Cochran this first day of September, 1896. I certify that said named persons are good for the amount of the judgment specified in the foregoing power of attorney.

WILLIAM D. COCHRAN,
Clerk Mason County Court.

26 At a court of appeals held in and for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 27th day of October, 1896, the following order was entered:

"CHESAPEAKE & OHIO RAILWAY Co., &c., Appellants,
v.
ALEXANDER DIXON'S ADM'X, Appellee.

Came the appellee, by counsel, and entered his appearance herein, and the cause is continued."

Afterwards, on the 10th day of November, 1896, the following order was entered of record herein:

"On motion of appellee, by counsel, the order of continuance herein is set aside and the cause is passed for briefs."

Afterwards, on the 12th day of December, 1896, the following order was entered of record herein:

"Ordered that this cause be continued."

Afterwards, on the 18th day of February, 1897, the following order was entered of record herein:

"The appellant moved the court for an oral argument herein; to which appellee objects.

"The appellee filed grounds and moved to submit this cause, and said motions are submitted."

The following are the grounds filed by the foregoing order:

"Kentucky Court of Appeals.

CHESAPEAKE & OHIO R'y Co., Appellant,
v.
DIXON'S ADM'X, Appellee. } Statement.

27 The record in this case was filed on the 1st day of Sept., 1896, and instead of sending summons upon the appeal to the sheriff of Boyd county for service, counsel for appellant took the summons and kept it till it was too late to serve it in time for the Sept. term.

The case was docketed, but continued. Counsel for appellee appeared and entered the appearance of appellee and made statement as above, and moved the court to set aside the order of continuance, which was done.

On Nov. 10th the case was called and passed for briefs, and no

briefs having been filed, on Dec. 12th the case was again called and continued. No brief from appellee was due until appellant's was filed. The brief for appellant was filed on Jan. 29th, 1897, and it now moves the court to continue the case for oral argument.

Unless the day on which the brief was filed is counted, it was not filed 20 days before the calling of the case for hearing, as required by rule 3.

Counsel for appellee has been anxious to get the record, but has been unable to do so, and is informed by the clerk that counsel for appellants have had it for more than 20 days last past, thus preventing counsel for appellee from preparing a brief or making any motion in the case upon the calling of the same today.

The record is now in the hands of the counsel for the appellant.

I therefore seriously object to any further continuance of this case, and ask that the appeal be dismissed with damages, or, if that is not done, that it be submitted with leave to file a brief when the record is returned.

28 February 18th, 1897.

J. A. SCOTT,
Att'y for Appellee."

Afterwards, on the 19th day of February, 1897, the following order was entered of record herein:

"The court being sufficiently advised, the motion to submit this cause is sustained and the cause is now submitted."

Afterwards, on the 28th day of October, 1898, the following judgment was entered of record herein—

Chief Justice J. H. Lewis, Justices J. H. Hazelrigg, T. H. Paynter, A. R. Burnam, B. L. D. Guffy, George De Relle, and J. D. White sitting:

"CHESAPEAKE & OHIO RAILWAY COMPANY, &c., Appellants, *v.* ALEXANDER DIXON'S ADM'X, Appellee.	Appeal from the Boyd Circuit Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that appellee recover of appellants ten per cent. damages on the amount of the judgment superseded herein, which is ordered to be certified to said court.

It is further considered that appellee recover of appellants *his* cost expended herein."

On the same day the court, through Chief Justice Lewis, delivered the following opinion herein:

This action was brought by Lucy Dixon, administratrix of Alexander Dixon, against the Chesapeake and Ohio R. R.
29 Co., owner, and R. H. Chalky and Wm. Sidles, engineer and fireman, of a railroad train, by collision with which plaintiff's intestate was killed.

The killing occurred on the crossing of the Chesapeake and Ohio R. R. leading from Catlettsburg to Ashland by a turnpike road extending from one to the other of the two cities and being the only public highway from Catlettsburg to Ashland. The place of said crossing is within the corporate limits of Catlettsburg, and very much used by persons in vehicles and on foot, the proof showing that as many as 500 or more persons cross there each day. Parallel to and about 8 feet from the Chesapeake and Ohio R. R. track is the track of the O. & B. S. railroad, likewise crossed by the same highway.

The evidence shows that at the time of the occurrence the deceased, Alexander Dixon, who was about 70 years of age, was going on foot from Catlettsburg westward to his home, near Ashland.

The train which killed him, being a passenger train, was going in the same direction.

According to the evidence of eyewitnesses, he had crossed the track of the O. B. S. R. R. and was near to and about to or had put his foot upon the track of the Chesapeake & Ohio R. R., when, his attention being apparently attracted, he looked up the track towards Catlettsburg, but seeing nothing, nor being able to see any object on the track at a greater distance than 6 or 700 feet, on account of a curve in the track and intervening houses, he turned and looked westward along the track, about which time he was struck by the train.

30 The train *which* was 15 minutes late and running, according to the testimony of the engineer, 15 to 20 miles, and according to the testimony of others between 30 and 40 miles, per hour. He was struck with such force as to knock his body 8 or ten feet in the air and drive it bounding 73 feet, measured. According to the testimony of the engineer, when he first discovered him, Dixon was between the track of the Chesapeake & Ohio R. R. and O. B. & S. R. R.; that he immediately gave the alarm signal by short, sharp blasts of the whistle and put the air brake on, and immediately Dixon looked in the direction of the approaching train; whereupon he released the air brakes, supposing Dixon would get out of danger; but other witnesses testify that the air brake was not put on until after Dixon was struck.

The engineer and trainmen testify that a signal by blowing the whistle of the approach of the train to the crossing was made at the usual place, and they were corroborated by others not connected with the train, while others, who were near to the whistling post and whose attention was given to the passing train, testify that there was no whistle until the train had approached very near to the crossing, when there were several sharp blasts of the whistle in quick succession.

There is evidence tending to show and from which the jury could reasonably find that those in charge of the train were guilty of negligence in two respects—first, in failing to give proper signal of the approach to the crossing; second, considering that the crossing was within the limits of a city, the fact of the great number of

31 people usually crossing at that place on vehicles and on foot and the short distance the track could be seen therefrom

looking eastward, it was a high degree of negligence to move the train when near the crossing at even the rate of speed admitted by the engineer it was running.

We will now consider the various grounds relied on by appellants for reversing the judgment.

It is contended that the verdict, which was $10,000, is excessive, and in that connection instruction number 4 is objected to, being as follows: "If the jury find for the plaintiff they shall assess such damages as will, in the opinion of the jury, reasonably compensate plaintiff for the loss sustained by the death of plaintiff's intestate, not exceeding $30,000, and in fixing the amount of such compensation the jury may take into consideration the power of the deceased to earn money."

This court has not heretofore considered itself authorized to interfere with the verdicts of juries on account of excessive damages assessed, unless they appear to have been given under the influence of passion or prejudice.

And, compared with other cases that have been heretofore passed on by this court, we cannot say the assessment in this case was excessive.

The instruction complained of, in our opinion, did not, nor could, mislead the jury or prejudice, nor, as argued by counsel, is it liable — the same objection made to an instruction in the case of the Ky. Central R. R. Co. *vs.* Gastineau, 83 Ky., 123. The court did not err to the prejudice of appellant in permitting evidence to go to
32 the jury that there was no flagman at the crossing where the accident occurred.

For though that crossing is, according to the evidence, such an one as to require a flagman, the jury was not instructed in regard thereto.

The argument of counsel that the evidence was, according to the rule confining a recovery to the particular acts of negligence charged, incompetent, is not well founded, because there are no specific acts of negligence charged in the petition of appellee. The main ground for reversal is the refusal of the lower court to sustain the petition of appellant Chesapeake & Ohio R. R. Co. for a transfer of this case to the United States court for the district of Kentucky.

The ground upon which the transfer was sought, as alleged in the petition asking it, is that the action is wholly between citizens of different States, the Chesapeake & Ohio R. R. Co. being a corporation created under the laws of the State of Virginia and a citizen thereof, while appellee, Lucy Dixon, is and was a citizen of the State of Kentucky. As appellants Chalkey and Sidles were, when this action was commenced, citizens of Kentucky, the Boyd circuit court had jurisdiction of the persons of all the defendants, as well as of the subject of the action, if the defendants were jointly guilty of the negligence alleged to have been the cause of the death of Alexander Dixon, and jointly liable therefor.

It is alleged by appellee in her petition and, so far from
33 the contrary being shown by appellant the Chesapeake & Ohio R. R. Co., is clearly proved by the evidence in this case,

that appellants Chalkey and Sidles, as engineer and fireman of said train, were guilty of the negligence causing said death, and that the Chesapeake & Ohio R. R. Co., through its said employees, was also guilty of said negligence, and therefore they were jointly liable for the destruction of the life of said Dixon caused thereby.

It is not material that, as alleged in the petition for a transfer of this case, Chalkey and Sidles were made parties defendant for the single purpose of preventing the removal of the case by the Chesapeake & Ohio R. R. Co. to the circuit court of the U. S. for the district of Kentucky, or what may have been the motive of the plaintiff for bringing a joint action, unless they were wrongfully and illegally joined, and such is the doctrine as settled by the Supreme Court of the United States.

As, therefore, appellant Chesapeake & Ohio R. R. Co. neither sufficiently alleged nor attempted to prove that the defendants were wrongfully joined as such, the lower court properly refused to make the transfer.

Judgment is affirmed.

Afterwards, on the 25th day of November, 1898, the following order was entered herein:

"Came the appellant, by counsel, and filed an affidavit and moved the court to extend the time thirty days for filing a petition
34 for rehearing herein; to which motion the appellee, by counsel, filed written objections, and the cause is submitted on the motion."

The following is the affidavit filed by the foregoing order:

Kentucky Court of Appeals.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
LUCY DIXON, Adm'r'x, &c., Appellee.

Affiant, A. M. J. Cochran, states that he is appellant's attorney in this case; that since the decision of this case by this court he has been constantly engaged in writing briefs for cases set on the docket for this present September term and in preparing for the present November term of the Mason circuit court; that he has been so occupied with these matters that it has been impossible for him to prepare a petition for rehearing in this case. He states that the Mason circuit court is now in session and will be for four weeks, and that the December term of the U. S. circuit court at Covington begins Monday week; that he has cases in both courts that will occupy him pretty constantly, and that he needs an extension of thirty (30) days in which properly to prepare a petition for rehearing herein. He states that this application is not made for delay, but in order that he may have time within which to prepare a petition for rehearing. He states also that his co-counsel, W. H. Wadsworth, has also been busily engaged since the decision of this case;

that he has been unable to attend to this matter, and, further,
35 that the preparation of the petition for rehearing has been assigned to him in the division of the work between him and his co-counsel. He asks on behalf of his client that the time within which a petition for rehearing may be filed by it may be extended thirty (30) days.

A. M. J. COCHRAN.

Sworn to before me by A. M. J. Cochran this November 23, 1898.

MARY O'MEARA,
Examiner for Mason County.

Following is written objections filed by foregoing order:

Kentucky Court of Appeals.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
LUCY DIXON, Adm'r'x, Appellee.
} Counter-statement.

In behalf of my client, who has already been too long delayed, I most seriously object to any further delay in this case.

I like to be accommodating, and the records of this court will show that I have been liberal in agreements for the accommodation of counsel for appellant in all of these cases, but unless sickness or unavoidable absence prevents, I do not think that the time deemed necessary by the legislature in all cases (30 days) ought to be extended, and I believe that the court in construing rule fifteen ought to announce this rule, or rather construction, in furtherance of justice.

36 Mere press of business ought never to be a reason for delay, and the announcement of such a rule would not, in my judgment, promote justice; for good lawyers are always busy, and railroad attorneys especially, and they can always truthfully make the affidavit made in this case and thus nullify the rule.

I submit that the facts stated in the affidavit for an extension do not, in the language of rule fifteen, "state sufficient cause therefor."

Respectfully submitted.

JAS. ANDREW SCOTT,
Attorney for Appellee.

Afterwards, on the 26th day of November, 1898, the following order was entered herein:

"The court being sufficiently advised, the motion of appellant in this case for an extension of thirty days' time to file a petition for rehearing is overruled, and the time is extended fifteen days to file a petition for rehearing."

Afterwards, on the 2nd day of January, 1899, the following order was entered herein:

"Came appellant, by counsel, and filed a petition and moved the

court to grant a rehearing herein, and the cause is submitted on said petition."

Said petition referred to in above order is as follows:

37 Kentucky Court of Appeals.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant, *vs.* ALEXANDER DIXON'S ADMINISTRATRIX, Appellee. } Petition for Rehearing.

May it please the court:

The appellant respectfully moves the court for a rehearing of this cause and earnestly insists that the case should be reversed for the following reasons:

1. The court below gave to the jury the following instruction:

"If the jury find for the plaintiff they shall assess such damages as will, in the opinion of the jury, reasonably compensate the plaintiff for the loss sustained by the death of plaintiff's intestate, not exceeding thirty thousand dollars, and in fixing the amount of such compensation the jury may take into consideration the power of deceased to earn money."

In the case of Kentucky Central Railroad Company *vs.* Gastineau's Adm'r, 83 Ky., page 128, a similar instruction was held to be erroneous. We quote it:

"Compensatory damages are such as will, in the opinion of the jury, compensate plaintiff as administrator for his intestate's life, and in fixing the amount of compensatory damages the jury can inquire as to the value of the decedent's power to earn money had he not been killed."

38 This court, in the opinion of October 28, 1898, in affirming the judgment below and referring to this ground for reversal, said:

"The instruction complained of, in our opinion, did not, nor could, mislead the jury or prejudice, nor, as urged by counsel, is it liable to the same objection made to an instruction in the case of the Kentucky Central Railroad Company *vs.* Gastineau, 83 Ky., 123."

The court draws no distinction between the two instructions, which are identical in their meaning, and, we presume, bases its conclusion upon the idea that there was a difference in the two cases as to the cause of action. The court seems to proceed upon the idea that this suit was for gross negligence, and that punitive damages might have been awarded, and therefore the instruction in this case could not be misleading. If this is so, there has been a misconception upon the part of the court as to the cause of action in this case.

This suit was brought pursuant to sec. 6, Ky. Statutes, or the act of July 3rd, 1893, and seeks only to recover for ordinary negligence and not for gross negligence, and a reference to the petition so

shows. It was, therefore, a suit for compensation only, and the instructions offered by plaintiff below clearly show this.

But the Gastineau case was a case in which punitive damages were involved, as well as compensatory damages, and this case is the stronger upon that account.

39 The instruction should therefore have been limited to the power of decedent to earn money, and, as said by Judge Holt, "the jury not permitted, as they may well have supposed from this instruction they could, to fix some speculative value to compensate plaintiff as administrator for his intestate's life;" and the verdict of $10,000 for the life of a man 72 years old, with no earning capacity shown, shows the jury did this very thing.

If, then, the inquiry should have been limited to the power of the decedent to earn money in the Gastineau case, it should, unless the Gastineau case is overruled, be limited in the case at bar to the power of the deceased to earn money. If the cases are fairly identical and the instruction is fairly identical, then the law should be administered alike to all, and the law in Gastineau should be the law in Dixon, otherwise the defendant in this case is deprived of the equal protection of the law, as guaranteed by the section 1 of article 14 of the Constitution of the United States.

2. Appellant insists that, this being a cause of action for compensation only, the verdict for $10,000 was excessive, and evidently given under a misconception of the law or under the influence of passion and prejudice.

The rule, as we understand it, is that when the damages are at large or entirely in the discretion of the jury, this court will not set aside the verdict unless it is so flagrantly excessive as to

40 at first blush shock the conscience of the court; but we do not understand that this is the rule where it is a question of compensation only, when the damages are and can be measured by well-defined rules of law. See Graham and Watterman on New Trials, vol. 3, pp. 1133, 1143, 1153, 1167; also L. & N. R. R. Co. *vs.* Fox, 11 Bush., page 495. The court in this case says:

"It is insisted, however, by counsel for the appellee that the rule of law is that in actions for personal injuries the amount of the finding is in the sound discretion of the jury, and that the court cannot pronounce their finding excessive unless it be so great as appears at first blush to be outrageous and to indicate passion or partiality in the jury." * * * "There is a large number of cases in which the language quoted, or language similar in import, has been used by this court; but in nearly if not all of the cases in which such language has been used the plaintiff was not only entitled to recover compensation, but was likewise entitled to such additional sum, by way of punishing the defendant, as the jury might deem right under all the facts and circumstances in evidence before them. Whether that rule should still be applied in that class of cases we need not decide, for in this case both parties, as we have already said, concurred in having the jury told to limit their finding to compensatory damages." * * * And again: "We concede that courts of all grades should exercise extreme caution in inter-

fering with the verdict of juries, and that an appellate court
41 should hesitate not only because of the delicacy of undertaking to set aside the finding of the constitutional triers of fact, but because of the concurrence with the jury of the judge presiding at the trial.

But if, after giving due weight to the verdict of the jury and the approval of the circuit judge, this court is clearly convinced, in a case in which the plaintiff is only entitled to recover compensatory damages, that the jury has gone beyond compensation and inflicted punishment on the defendant under the influence of passion or prejudice, it is bound *to* the weightiest considerations of duty to direct a new trial. To refuse to do so is to abandon the defendant to the arbitrary will of the jury. The supervising control of the courts, both of original and appellate jurisdiction, is, in this country, an integral part of the jury system, and as indispensable to the right administration of justice as the panel of twelve men."

The administratrix of Dixon was entitled to recover the loss to the estate by the death of the decedent, so far as his power to earn money was concerned. It was shown that Dixon was an old man, 72 years old; that he was not active, but stiff, and that he lived in the country, near Catlettsburg, walking to town probably once a week. It was not shown that he earned anything. As in the Fox case, no earning power was shown at all. The jury were bound to consider, then, the case of a man 72 years old,
42 inactive and stiff, with no earning capacity proven. The burden being on plaintiff, they had no right to assume it, only as in the case of the ordinary run of men similarly situated. His expectation of life, according to the tables, was about 9 years. Now, if the jury had allowed him, over and above his necessary expenses, $300.00 per year, which we claim is high, we should have no such result as their verdict. Remember, the estate recovers only its loss—that is, $300.00—at the end of each year for nine years. It was a question, then, as to what lump sum paid in advance would compensate the estate for the loss of $300.00 per year for nine years—in other words, the present value of $300.00, payable for each respective year for nine years. We submit a table showing exactly what it would be:

1st year, present worth of $300.00	$283.02
2nd " " " "	267.84
3rd " " " "	254.22
4th " " " "	241.92
5th " " " "	230.76
6th " " " "	220.56
7th " " " "	211.26
8th " " " "	202.68
9th " " " "	194.76
Total lump sum	$2,107.02

But we may go further, and we may double the annual sum this

old man would presumably earn, and the lump sum paid in
43 advance would only be $4,214.04, or we may quadruple it and allow him $1,200.00 per year, and the sum would be $8,428.08—much less than the verdict.

But it seems to us the court must treat this decedent as an ordinary old man "sans eyes, sans teeth, sans everything," with no earning capacity, or at most a very slender one, and to allow a verdict of $10,000 to stand as representing the loss to his estate by his death strikes one as at first blush a travesty on justice and an abandonment of this corporation to the caprices of an arbitrary jury.

3rd. We would direct the court's attention again to the error of the lower court in refusing to remove the case to the Federal court, a proper petition and bond for removal having been filed in due time. The court gives as its reason for so holding that the appellant and its servants, united with it as defendants, are jointly liable. We submit that this court is in error in so holding. It seems to us that it is impossible to escape the reasoning of the cases cited in our brief on this point, to wit:

Warax *v.* C., N. O. & T. P. R'y Co., 72 Fed., 637.
Hukill *v.* M. & B. S. R. R. Co., 72 Fed., 745.

It is easy to say that the appellant and its servants are jointly liable, but not so easy to refute the reasoning of those cases.

In addition to those cases see the case of Hartshorn *v.* R. R. Co., 77 Fed., 9, to the same effect as above.

It may be that the case of Deere, Wells & Co. *v.* Chicago, &c.,
44 Co., 85 Fed., 876, has been or will be cited as an authority to the contrary; but it is not. It expressly recognizes the above cases as correct. That was not a case where the master was sought to be made liable on the principle of respondent superior, but for his own negligence, which it was claimed co-operated with the servant's negligence, and the master and servant were therefore sued jointly upon the same cause of action; not as here, where the master is sought to be made liable for the servant's negligence because of the relation between them, which is one cause of action, and the servant is sought to be made liable for his own negligence, which is another cause of action. Here there was no joint liability, nor could any be claimed.

The cases we rely on have been recently adhered to by Judge Barr, of this Federal district, and that since the decision in 85 Federal, 876; that case was cited to him, but he did not consider it as changing, or attempting to change, the decisions of his Federal circuit.

In the case of Henry Lambert's Administrator *v.* C. & O. R'y Co., pending at Covington, Ky., at last May term of Federal court, he rendered the following opinion, to wit:

United States Circuit Court, District of Kentucky.

HENRY LAMBERT, Adm'r,
vs.
THE C. & O. R'Y Co.

Opinion on Motion to Remand.

This suit seeks to recover of the defendant, The C. & O. R'y Co., and William Myers and two other employees of the C. & O.
45 R'y Co. for negligence which is alleged to have caused the death of plaintiff's intestate.

William Myers, Walton Elliott, and Charles Long were at the time of the alleged negligence employees of the C. & O. R'y Co. as conductor, engineer, and fireman respectively of the train that ran over and killed the decedent, Enyart, and they are charged with the negligence which caused his death. The defendant railway company is sought to be made liable for these employees' negligence, and is alleged to be jointly liable in this action with these employees.

The employees are alleged to be of the same citizenship with the plaintiff, but they are not before the court by actual service of summons in the State court.

In this condition of the record the C. & O. R'y Co. filed a petition for removal to this court, alleging diverse citizenship between plaintiff and itself, and alleging that the defendants, who were employees, were not necessary or proper parties, and were only made defendants to prevent a removal to this court, and alleging that they and the defendant railway company were jointly liable for the alleged negligence.

The State court allowed the removal of the defendant The C. & O. R'y Co., and approved the bond executed by said company.

The plaintiff has filed answer in this court denying that the defendants Myers, Elliott, and Long were made parties defendant in bad faith or with the purpose of preventing a removal to this court, and moved the court to remand the cause to the Boyd cir-
46 cuit court, from whence the case has been removed.

The motion has been submitted and the defendant railway company has offered no evidence to sustain its allegations of bad faith upon the part of plaintiff in uniting Myers & Elliott and Long as defendants with their employer, the railway company.

Thus the question to be decided is whether these defendants are jointly liable with their employer, the railway company. Here the railway company is sued for the negligence of their servants in and about the business of the railway company, and it is now settled in this circuit that the employees (servants) are not jointly liable with their employer (master), though the negligence was that of the servants; but there must be an election to sue as between the master and his servant unless the master participated in or directed the act or the omission to act which constitutes the negligence.

See Warax *v.* C., N. O. & T. P. R'y Co., 72 Fed. Rep., 638.

The question has not been passed upon by the supreme court, but the decision of the circuit judges was made after full argument and a careful consideration and is clearly binding upon this court; but if not, should be followed.

The question of what would be the condition of the record had Myers and the other employés been made parties by actual service of the summons in the State court cannot arise in this case, as we have seen they are neither before this court nor the State court.

47 The motion to remand to the State court must be overruled, and it is so ordered.

In view of these authorities, we think we are entitled to a reversal of the judgment appealed from.

For these reasons we submit that we should have a rehearing and reversal.

WADSWORTH & COCHRAN,
Attorneys for Appellant.

Authorities.

Kentucky Central Railway Company *v.* Gastineau's Adm'r, 83rd Ky., 128.
Graham and Watterman on New Trials, vol. 3, pages 1133, 1143, 1153, 1167.
L. & N. R. R. Co., *v.* Fox, 11th Bush, page 495.
Warax *v.* C., N. O. & T. P. R'y Co., 72 Fed., 637.
Hukill *v.* M. & B. S. R. R. Co., 72 Fed., 745.
Hartshorn *v.* R. R. Co., 77 Fed., 9.
Deere Wells & Co. *v.* Chicago &c., Co., 85 Fed., 876.

48 Afterwards, on the 11th day of February, 1899, the following order was entered of record herein:

"Came the appellee, by counsel, and filed a response to the petition for rehearing herein."

Said response is as follows:

Kentucky Court of Appeals.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant, *vs.* ALEXANDER DIXON'S ADMINISTRATRIX, Appellee.	Response to Petition for Rehearing.

All the questions that were elaborately argued by opposing counsel for appellant on the original hearing of this case have been again discussed in the petition for rehearing, though the opinion of this court rendered by ex-Chief Justice Lewis distinctly settles all those questions.

We deem it necessary to respond to the petitions for rehearing only in so far as it discusses the instruction as to compensatory damages.

Opposing counsel insist that this instruction was erroneous and

misleading, and cite with confidence the case of Ky. Central R'y Co. *vs.* Gastineau's Adm'r, 83 Ky., 119.

Upon examination of that case it will be ascertained that the judgment below was reversed because the court there told the jury that if the company was guilty of wilful neglect, they "ought" to find punitive or exemplary damages for plaintiff.

2. And, again, that the definition of "wilful neglect" was misleading.

49 3. And, further, that the deceased was a trespasser, and that the court erred in assuming that the company owed him a high degree of care.

These were the reasons for reversing that judgment, and as the case was going back for new trial the court suggested that the instruction as to compensatory damages might lead the jury to find some speculative damages—that is, the instruction might mislead the jury or might have mislead them; but the court there did not pretend to say that the judgment would have been reversed on that instruction alone; they did not decide that it was a reversible error, and so in the case at bar it cannot be said that the instruction given, even if not worded as aptly as it might have been, was so misleading that the judgment ought to be reversed on that ground alone.

Judge Holt seems to have discussed this question of compensatory damages in the Gastineau case as an original proposition, since he does not refer to any authorities on the subject; but upon looking at the citations of the lawyers for Gastineau we find that Judge Lindsay discussed the question in case of L. C. & L. R'y *vs.* Case, 9 Bush, 736, and that Judge Holt must have had that case in mind when writing the opinion in the Gastineau case. If the 9 Bush case prompted the remarks on compensatory damages in the Gastineau case, then we can say without fear of contradiction that the Gastineau case is in no ways similar on this subject to case at bar.

In the 9 Bush case the court instructed the jury as
50 follows:

You will find for the plaintiff—

"Such damages as the jury might deem just and proper by way of compensation, not exceeding amount claimed in petition."

That instruction, of course, permitted the jury to enter upon a field of speculation in finding compensatory damages, and, indeed, was not only misleading, but absolutely erroneous, and such error was reversible error.

Judge Holt says in the Gastineau case that that instruction might allow the jury to find speculative damages. This, we say, was prompted by the 9 Bush case, but there is as much difference between the 9 Bush case and the Gastineau case as there is between night and day. In one case it was reversible error; in the other it is said that it might mislead the jury.

Nor can we agree with the reasoning in the Gastineau case. There the court is made to say that the jury was permitted to fix some speculative value to "compensate plaintiff as administrator for his intestate's life."

What speculative damages could the jury have found for plaintiff as administrator?

Could it have been loss of society and companionship of deceased? Not at all, because deceased never associated with plaintiff as administrator, nor could deceased have been the administra-
51 trix'-companion. Could they possibly under the instruction, agreeing that they — sensible men, have considered anything save "the value of the deceased's power to earn money"?

The court told the jury in fixing compensatory damages they may consider the value of deceased's power to earn money.

That instruction confined the jury to finding for the plaintiff as administratrix. What does that mean? It means the estate of deceased, represented by plaintiff as administratrix; and in compensating the estate, what speculative damages could they assess?

Opposing counsel know that the construction placed on that instruction and argued by counsel below was that the jury could only consider the value of the deceased's power to earn money.

The lower court would not for a second have permitted counsel to argue anything else.

This instruction as to compensatory damages was directly passed on by the court in its opinion in this case, and as said there by ex-Chief Justice Lewis:

"Second. Considering that the crossing was within the limits of of a city, the fact of the number of people usually crossing at that place in vehicles and on foot, and the short distance the track could be seen therefrom looking eastward, it was a high degree of negligence to move the train, when near the crossing, at even *at* the rate of speed admitted by the engineer it was moving."

52 We ask, therefore, that the court say the substantial rights of the appellant have not been prejudiced, even if we concede, which we do not, that the instruction was misleading.

Opposing counsel argues further that this is not a case where recovery could be had for "gross negligence," because the petition only seeks to recover for "negligence."

From this we understand them to say that where a petition alleges that injury resulted from "negligence" a recovery cannot be had for gross negligence.

This is not the rule. On the contrary, this court has held that the allegation "negligence" covers all degrees of negligence, and recovery can be had for "gross negligence" under an allegation simply of "negligence."

See East Tenn. Telephone Co. *vs.* Simm's Adm'r R.

The petition for rehearing should be overruled.

Respectfully submitted.

J. A. SCOTT, &c.,
Attorneys for Appellee.

Afterwards, on the 23rd day of March, 1899, the following order was entered of record herein:

"The court being sufficiently advised, the petition for rehearing

herein is overruled. Judges Paynter, Du Relle, and Burnam delivered their dissent. The whole court considered the case."

53 The dissent filed by the foregoing is as follows:

Court of Appeals of Kentucky, March —, 1899.

C. & O. RAILWAY Co., Appellant,
vs.
DIXON'S ADM'R'X, Appellee.
} Appeal from Boyd Circuit Court.

Dissenting Opinion.

Judges Burnam, Du Relle, and Paynter dissent because in their opinion the instruction fixing the measure of damages is erroneous. It is substantially the same as the instruction given on the measure of damages in the Gastineau case (83 Ky., 119), which was condemned by this court.

Afterwards, on the 24th day of March, 1899, the appellant and plaintiff in error, Chesapeake & Ohio R'y Co., filed a notice of severance as follows:

Court of Appeals of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, &C., Appellants,
vs.
LUCY DIXON, Administratrix of Alexander Dixon, Appellee.

54 To R. H. Chalkey and William Sidles:

You are hereby notified that the undersigned, Chesapeake and Ohio Railway Company, sued herein with you, will, on the 24th day of March, 1899, at Frankfort, Kentucky, apply to the Hon. James H. Hazelrigg, chief justice of the court of appeals of Kentucky, for a writ of error, with supersedeas, to the Supreme Court of the United States, and in case you shall not then and there appear and join in said application, the undersigned will ask for a writ of error in its own name.

Signed this 23rd day of March, 1899.

CHESAPEAKE & OHIO RAILWAY CO.,
By WADSWORTH & COCHRAN, *Attorneys.*

The undersigned accept service of the above notice, and hereby decline to join in any application for a writ of error in the above case.

Signed this 23rd day of March, 1899.

W. SIDLES.
R. H. CHALKEY.

On the same day the plaintiff in error filed its writ of error in the clerk's office of the Kentucky court of appeals as follows:

55 UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law of equity of the said State in which a decision could be had in the said suit between The Chesapeake & Ohio Railway Company, R. H. Chalkey, and William Sidles, appellants, and Lucy Dixon, administratrix of Alexander Dixon, appellee, wherein was drawn in question a right and authority existing under the laws of the United States and the decision was against the exercise of such right and authority, and wherein was drawn in question the construction of a statute of the United States and the decision was against the title, right, or privilege specifically set up and claimed under said statute of the United States, a manifest error hath happened, to the great damage of the said Chesapeake & Ohio Railway Company, as by its complaint appears; and whereas it has given written notice to its said co-appellants in said cause of its intention to apply for a writ of error from the Supreme Court of the United States to the said court of appeals of Kentucky in said cause specifying in said notice the time and place of such intended application, as appears from such notice, duly executed on all said parties and which is attached hereto, said coappellants and each of them having, however, failed to appear at the time of the making of such application, which was at the time and place mentioned in said notice, and being therefore made defendants in error herein, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judg-

56 ment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to the laws and customs of the United States shall be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 23rd day of March, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-third.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOMAS SPEED,
Clerk U. S. Circuit Court, Kentucky District,
By HENRY F. CASSIN,
Deputy Clerk.

Allowed March 24th, 1899.

J. H. HAZELRIGG,
Chief Justice of the Court of Appeals of Kentucky.

56½ [Endorsed:] Chesapeake & Ohio R'y Co. *vs.* Lucy Dixon, adm'r, &c. Writ of error. 1899, March 24, filed.

57 On the same day the plaintiff in error filed in said clerk's office its bond, a copy of which is in words and figures following, to wit:

58 Court of Appeals of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, &c., Appellants,
vs.
LUCY DIXON, Administratrix of Alexander Dixon, Appellee.

Know all men by these presents that the Chesapeake & Ohio Railway Company, principal, and Andrew M. J. Cochran are held and firmly bound unto Lucy Dixon, administratrix of Alexander Dixon; R. H. Chalkey, and William *D*idles in the sum of fifteen thousand dollars, to be paid to the said obligees herein; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 24th day of March, 1899.

Whereas the above-named Chesapeake & Ohio Railway Company hath prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the court of appeals of Kentucky, the said writ of error to operate as a supersedeas:

Now, therefore, the condition of this obligation is such that if the above-named Chesapeake & Ohio Railway Company shall prosecute its said writ of error to effect and answer to the judgment herein rendered, damages and all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
By A. M. J. COCHRAN, *Att'y.* [SEAL.]
ANDREW M. J. COCHRAN. [SEAL.]

March 24th, 1899.

Approved:
J. H. HAZELRIGG,
Chief Justice Ky. Ct. Appeals.

58½ [Endorsed:] Chesapeake & Ohio R'y Co. *vs.* Lucy Dixon, admr., &c. Bond. 1899, March 24, filed.

59 On the same day the plaintiff in error filed in said clerk's office its assignment of errors in words and figures following, to wit:

Supreme Court of the United States.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error, vs. LUCY DIXON, Administratrix of Alexander Dixon, Defendants in Error. } Assignment of Errors.

The Chesapeake & Ohio Railway Company, plaintiff in error in the above-entitled cause, complains of the judgment rendered herein by the court of appeals of Kentucky, and for error therein assigns the following:

I.

The court erred in affirming the judgment of the Boyd circuit court, whereas it should have reversed the same, with directions not to proceed in the said cause.

II.

The court erred in holding in substance and effect that the Chesapeake & Ohio Railway Company had no right under the Constitution and laws of the United States to remove the cause pending in the Boyd circuit court against it to the circuit court of the United States for the district of Kentucky, and that the said Chesapeake & Ohio Railway Company had no right under the Constitution and laws of the United States to have the said cause removed as aforesaid.

60

III.

The court erred in holding that the Boyd circuit court had any right to proceed and further in the said cause after the petition to remove the same on behalf of the Chesapeake & Ohio Railway Company had been filed in the said Boyd circuit court.

IV.

The court erred in holding that the proceedings in the Boyd circuit court after the filing of the petition of the Chesapeake & Ohio Railway Company therein for the removal of the said cause to the circuit court of the United States were not void and of no force and effect as against the said Chesapeake & Ohio Railway Company.

Wherefore the said Chesapeake & Ohio Railway Company prays that the said judgment of the court of appeals of Kentucky be reversed, with directions to take such order in the premises as will result in the nullification of the judgment against it and the removal of the said cause from the Boyd circuit court.

WADSWORTH & COCHRAN,
Attorneys for Plaintiff in Error,
The Chesapeake & Ohio R'y Co.

March 24, 1899.
5—273

On the same day the plaintiff in error filed its order for record as follows:

61 Court of Appeals of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, &c., Appellants,
vs.
LUCY DIXON, Administratrix of Alexander Dixon, Appellee. } Præcipe.

Samuel J. Shackelford, Esq., clerk of the court of appeals:

In making transcript of the record herein for use upon the writ of error to the Supreme Court of the United States from the judgment of the court of appeals allowed herein, you will omit the bill of exceptions, containing the evidence heard upon the trial in the court below, and will copy the entire record except said bill of exceptions for use thereupon, and certify accordingly.

March 24, 1899.

WADSWORTH & COCHRAN,
Attorneys for Appellant Chesapeake & Ohio Railway Co.

62 THE COMMONWEALTH OF KENTUCKY, } *sct:*
Court of Appeals,

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, hereby certify that the preceding sixty-one pages contain a true and complete transcript of the record and proceedings had in said court of appeals on the appeal of the Chesapeake & Ohio Railway Company, &c., appellants, against Lucy Dixon, administratrix of Alexander Dixon, appellee, except the bill of exceptions (which by order of appellants' counsel is not copied herein), together with the original writ of error (a copy of which is on file in my office), a copy of the bond, order of severance, and assignment of errors, all of which appear of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office.

Done at Frankfort, Kentucky, this 29th day of March, A. D. 1899.

[Seal Kentucky Court of Appeals.]

SAMUEL J. SHACKELFORD,
Clerk Kentucky Court of Appeals.

Fee for this transcript, $19.75.

63 Court of Appeals of Kentucky.

CHESAPEAKE AND OHIO RAILWAY COMPANY, &c., Appellants,
vs.
LUCY DIXON, Administratrix of Alexander Dixon, Appellee.
} Notice.

To Lucy Dixon, administratrix of Alexander Dixon:

You are hereby notified that we have this day filed with the clerk of the court of appeals of Kentucky a præcipe directing him to omit from the transcript of the record herein, to be made by him for use upon the writ of error allowed to the Supreme Court of the United States from the judgment of the court of appeals of Kentucky, the bill of exceptions, containing the evidence heard upon the trial in the court below, and to copy the entire record except said bill of exceptions for use thereupon, and to certify accordingly.

WADSWORTH & COCHRAN,
Attorneys for Chesapeake & Ohio Railway Company.

March 24th, 1899.

Service of above notice by copy delivered this day is hereby acknowledged on behalf of appellee and defendant in error.

JOHN F. HAGER,
Of Counsel for Lucy Dixon, Adm'x.

March 28th, 1899.

64 UNITED STATES OF AMERICA:

The President of the United States to Lucy Dixon, administratrix of Alexander Dixon; R. H. Chalkey, and William Sidles, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the 19th day of April next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein The Chesapeake & Ohio Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this March 24th, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-third.

J. H. HAZELRIGG,
Chief Justice Ct. Appeals Ky.

I hereby accept service of the above citation on this 28th day of March, 1899.

JOHN F. HAGER,
Counsel for Lucy Dixon, Administratrix of Alexander Dixon, Dec'd, Defendant in Error.

65 We hereby accept service of the above citation this March 31st, 1899.

R. H. CHALKLEY.
W. SIDLES.

66 [Endorsed:] Chesapeake & Ohio R'y Co. *vs.* Lucy Dixon, admr., &c. Citation.

Endorsed on cover: File No., 17,382. Kentucky court of appeals. Term No., 273. The Chesapeake and Ohio Railway Company, plaintiff in error, *vs.* Lucy Dixon, administratrix of Alexander Dixon, deceased; R. H. Chalkey, & William Sidles. Filed April 26th, 1899.